Kucinich Demands Further SEC Investigation

Documents Uncovered by Congressional Investigation Further Case Against BofA

Washington D.C. (August 4, 2009) – Representative Dennis Kucinich (D-OH) today sent a letter to Securities and Exchange Commission (SEC) Chairman Mary Schapiro requesting that the SEC expand its investigation of Bank of America (BofA) for possible violations of securities laws. Kucinich, Chairman of the Domestic Policy Subcommittee, transmitted several documents subpoenaed by Chairman Ed Towns of the Oversight and Government Reform Committee in their joint investigation of the Bank of America-Merrill Lynch merger. The documents reveal that high ranking officials inside the Federal Reserve believed that Bank of America had withheld material information about deteriorating conditions at Merrill Lynch from shareholders in advance of the shareholder vote and that those actions could be violations of securities laws. Ordinarily, the SEC would not have access to these documents.

The full text of the letter follows:

The supporting documents are available here .

August 4, 2009

Ms. Mary Schapiro
Chairman
Securities and Exchange Commission
100 F Street NE
Washington, DC 20549

Dear Chairman Schapiro:

With the filing and settlement of charges yesterday by the Securities and Exchange Commission against Bank of America for withholding material information from shareholders concerning the payment of bonuses, I believe that the SEC has only begun enforcing the nation's securities laws as they apply to Bank of America's handling of its merger with Merrill Lynch. There is more for SEC to investigate.

The Domestic Policy Subcommittee, in conjunction with the Oversight and Government Reform Committee, has been investigating the merger and the Federal government's rescue of it. In connection with this investigation, we have reviewed over 10,000 pages of confidential documents obtained from the Federal Reserve ("Fed"). Of relevance to the SEC, our investigation has revealed:

Top staff at the Federal Reserve had concluded that Bank of America knew, as early as mid-November, about a sudden acceleration in the losses at Merrill Lynch, and

Fed General Counsel Scott Alvarez believed that Bank of America could potentially be liable for securities laws violations for its failure to update its proxy solicitation and public statements it had made about the merger in light of information Bank of America possessed about Merrill's deterioration before the shareholder vote.

These conclusions raise serious questions about the legality of statements to shareholders made by Bank of America before its merger with Merrill Lynch. During November 2008, Bank of America filed a proxy solicitation and made public statements advocating for the merger and referring to financials from the preceding years. At no time prior to the shareholder vote on December 5, 2008 did Bank of America file an amendment to its proxy solicitation correcting misimpressions investors received. Rather, Bank of America secretly began conversations with the U.S. Treasury Department and Federal Reserve about the company's consideration of invoking the material adverse change clause in their merger agreement contract and, subsequently, about receiving federal assistance to insulate against the considerable losses the merger with Merrill was inflicting on Bank of America's balance sheet.

As you know, the securities laws are designed to make accurate information available to the investing public, particularly proxy information distributed to investors prior to a shareholder vote. Thus, once a potential merger is disclosed by an issuer, a duty to "update opinions and projections may arise if the original opinions or projections have become misleading as the result of intervening events.'"[1] The Supreme Court has held that "an omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote."[2] I believe that the findings and opinions expressed by high ranking officials at the Fed about Bank of America's withholding material information from investors are well founded and merit SEC review.

I hereby request that the SEC expand its investigation into possible securities law violations committed by Bank of America in connection with its merger with Merrill Lynch. Under normal circumstances, SEC would not have access to internal Fed documents. But I believe it serves a public purpose to transmit to SEC the following documents obtained under subpoena issued by Chairman Edolphus Towns of the Oversight and Government Reform Committee:

An email from a senior adviser at the Federal Reserve to Chairman Bernanke: "[there are] clear signs in the data we have that the deterioration at ML has been observably under way over the entire quarter – albeit picking up significantly around mid-November." (Appendix 1)
A restricted Federal Reserve analysis of Bank of America-Merrill Lynch merger: "BAC management's contention that the severity of MER's losses only came to light is problematic and implies substantial deficiencies in the diligence carried out in advance of and subsequent to the acquisition¦These were clearly shown in Merrill Lynch's internal risk management reports that BAC reviewed during their due diligence¦The potential for losses from other risk exposures cited by management, including those coming from leveraged loans and the trading in complex structured credit derivatives products ('correlation trading') should also have been reasonably well understood, particularly as BAC itself is also active in both these products." (Appendix 2)

An email from the Fed's General Counsel to Chairman Bernanke: "Lewis should have been aware of the problems at ML earlier (perhaps as early as mid-November) and not caught by surprise. That could cause other problems for him around the disclosures BA made for the shareholder vote." (Appendix 3)

An email from the Fed's General Counsel to Chairman Bernanke: "A different question that doesn't seem to be the one Lewis is focused on is related to disclosure. Management may be exposed if it doesn't properly disclose information that is material to investors¦ His potential liability here will be whether he knew (or reasonably should have known) the magnitude of the ML losses when BA made its disclosures to get the shareholder vote on the ML deal in early

December." (Appendix 4)

I also transmit a statistical study submitted to our committees by an independent statistics expert finding that Bank of America had strong statistical reasons to believe that the losses evident in mid-November would continue through the end of the year. (Appendix 5).

The Oversight and Government Reform Committee is the principal oversight committee in the House of Representatives with broad and has broad oversight jurisdiction as set forth in House Rule X.

If you have any questions regarding this request, please contact Jaron Bourke, Staff Director at (202) 225-6427.

Sincerely,

Dennis J. Kucinich

Chairman

Domestic Policy Subcommittee

cc: Jim Jordan

Ranking Minority Member

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[1] See In re Time Warner Inc. Sec. Litig., 9 F,3d 259, 266 (2d Cir. 1993).

[2] See TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438, 449 (1976).